

Petition for rehearing filed November 12, 1999. The State Personnel Board denied the Petition for rehearing at its February 8-9 meeting.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by

ETHEL WARREN

From dismissal from the position of
Correctional Officer at the Northern
California Women's Facility with the
Department of Corrections at Stockton

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SPB Case No. 98-2130

BOARD DECISION

(Precedential)

No. 99-09

October 5-6, 1999

APPEARANCES: Fred Wasilewski, Senior Hearing Representative, California Correctional Peace Officers Association (CCPOA), on behalf of appellant, Ethel Warren; Gregory L. Nicholas, Staff Counsel, Department of Corrections, on behalf of respondent, Department of Corrections.

BEFORE: Florence Bos, President; Ron Alvarado, Vice President; Richard Carpenter and William Elkins, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the Proposed Decision of the Chief Administrative Law Judge (CALJ) to review two issues: (1) what is the appropriate penalty for the misconduct respondent Department of Corrections (Department) proved against appellant Ethel Warren (appellant); and (2) whether appellant is entitled to an award of backpay as a result of the Department's having amended the Notice of Adverse Action (NAA) on the first day of hearing before the CALJ. In this Decision, the Board finds that dismissal is the just and proper penalty for the proven misconduct. The Board also finds that appellant is not entitled to an award of backpay as a result of the NAA amendment.

When the Board rejected the Proposed Decision, it asked the parties to brief the issue of whether the Board should reconsider its precedential decision in Walter Masters (Masters).¹ In this Decision, the Board finds that, if an employer amends an adverse action to include new charges, the employee must be offered a new Skelly meeting, and the effective date of the adverse action must be changed to a date no earlier than five days after the employee is offered an opportunity to respond to the new charges at that new Skelly meeting. The Board, therefore, overturns Masters to the extent it is inconsistent with this Decision.

BACKGROUND
Factual Summary²

(Employment History)

Appellant has worked as a Correctional Officer (CO) for the Department since February 1986. She has been employed at Northern California Women's Facility (NCWF) since March 1989.

The Department has served two prior adverse actions upon appellant. In October 1991, the Department served a notice of adverse action upon appellant that suspended her for 15 days for making profane, derogatory, and unprofessional remarks, and for failing to appear at an investigatory interview. In that case, the Board adopted the proposed decision of the administrative law judge that modified the penalty to a 7-day suspension, finding that appellant had made the statements attributed to her, but dismissing the charge of insubordination. That decision noted that appellant had

¹ (1995) SPB Dec. No. 95-13.

² The factual summary is taken substantially from the Proposed Decision.

received a counseling memorandum in 1990 for gossiping and slanderous remarks, and two other counseling letters for misconduct.³

On January 1, 1994, the Department served a notice of adverse action upon appellant suspending her for 15 calendar days for making derogatory comments to a co-worker that he was a “yellow-skinned nigger” with “white blood.” In January 1995, the Board approved a Stipulation for Settlement between the parties in that case that reduced the penalty to a 10-day suspension.⁴

(June 10, 1997 “Snitch/Rat” Incident)

On June 9, 1997, Program Sergeant Gabriel Lomeli (Lomeli), appellant’s first line supervisor, requested Control Booth Officer John Bryant (Bryant), in the Administrative Segregation Unit/Housing Unit (HU) 2 on third watch⁵ to keep track of the time meals arrived because inmates had complained about cold food.

On June 10, 1997, Bryant wrote in the logbook that the food trays arrived at 4:10 p.m. in HU 2. Appellant and the other floor officer, Correctional Officer Guerrero (Guerrero) served the meals over the next hour. After mealtime, Guerrero picked up the trays from the bottom tier at approximately 6:00 p.m. Appellant was on the telephone from the time she finished serving the meals, and had not picked up the trays from the top tier by 6:00 p.m.

At 6:05 p.m., the Culinary Officer called Bryant and asked if the food trays were ready to be picked up. Bryant said that the bottom tier was completed but not the top.

³ SPB Case No. 30559.

⁴ SPB Case No. 33951.

⁵ Third watch hours are 2:30 to 10:30 p.m.

The Culinary Officer told Bryant that he had been trying to call the HU but the line was busy. Bryant informed appellant that the Culinary Office had called for the trays.

Appellant said “okay,” but continued talking on the telephone.

At about 6:55 p.m., appellant picked up the food trays from the top tier, placed them on the cart with the others, and asked Bryant to open the gate so the trays could be picked up. Bryant told appellant that the Culinary Office would not pick them up at that time because they were signing out for the day. Appellant directed Bryant to open the gate. She pushed the cart bearing the dirty food trays outside the HU building.

Bryant believed that leaving dirty food trays outside the HU presented a health and safety issue. Bryant contacted Watch Sergeant Cavalier (Cavalier) to report the location of the trays and cart, and arrange for them to be retrieved. Cavalier told Bryant to document the incident. Bryant prepared a handwritten memo to document the incident. Bryant did not tell appellant or Guerrero that he had written the memo.

At 9:45 p.m., appellant called Bryant and asked if he was “snitching” on her. Bryant said no. Appellant accused Bryant of calling Lieutenant Vevea (Veeva). Bryant responded that he did not contact Vevea, but had called Cavalier. Appellant told Bryant he was a “rat”, and a “snitcher”, and inquired why he had reported her. Bryant replied that it was not appropriate to leave the food trays outside the HU. Appellant called Bryant a “fucking snitch,” and questioned why Bryant had contacted the Watch Sergeant rather than the Program Sergeant. Bryant stated, “I’ll call whoever I

want.” Appellant remarked, “Cavalier is white, you’re white,⁶ I’m beginning to think this is a racial thing.”

Bryant was offended by appellant’s remarks because they implied he was a racist when he had several African American friends. In February 1997, Bryant had warned appellant that he would not tolerate her use of profanity in their conversations.

Appellant denied making any racial comments, using profanity, or calling Bryant a “rat” or a “snitch” during both her April 8, 1998 investigatory interview and the hearing before the CALJ. She testified that she did not work well with Bryant because he did not “go by the book,” and had his own way of doing things. She stated that she had complained about Bryant to two supervisors and the Chief Deputy Warden. According to appellant, Bryant should not be believed because he had an “agenda” and reported other employees without telling them.

The CALJ did not credit appellant’s denials, but, instead, credited Bryant’s version of the incident, using the standards of credibility set forth in Evidence Code § 780.⁷ In making this determination, the CALJ noted that appellant had been disciplined before for using profanity and making statements with racial overtones. The Board adopts the CALJ’s credibility determinations.⁸

⁶ Appellant is African-American.

⁷ Evidence Code § 780 identifies the following factors, among others, to be considered when determining the credibility of a witness: demeanor; character of testimony; capacity to perceive/recollect/communicate; bias/interest/motive; prior consistent/inconsistent statements; attitude; admissions of untruthfulness; and existence/nonexistence of facts testified to.

⁸ Linda Mayberry (1994) SPB Dec. No. 94-25, p. 7.

(November 11, 1997 Alarm Incident)

On November 11, 1997, appellant was assigned as one of two floor officers in HU 1, working third watch. The other floor officer was Correctional Officer Lance Hanberg (Hanberg), who had only worked at NCWF for two months. The Control Booth Officer was Andrew Mojarros (Mojarros). The unit housed 60 to 100 inmates.

At about 7:30 p.m., during free time for the inmates not confined to their cells, appellant had an encounter with inmate G., a general population inmate. Inmate G. was attempting to communicate with inmate L., a Close B inmate,⁹ outside inmate L.'s cell door. Appellant yelled at inmate G. to get away from the area. Inmate G. complied, but then returned to inmate L.'s cell. After several of these exchanges, inmate G. was locked in her cell.

More than an hour later, at approximately 8:45 p.m., appellant asked Mojarros to release inmate G. from her cell, and to listen to their conversation because she wanted to give inmate G. a CDC-115 (115).¹⁰ Mojarros called inmate G., and told her to come out of her cell and go to where the HU phone was located to talk to appellant. While Mojarros listened on the phone, appellant told inmate G. that she was going to issue her a 115 for disobeying an order, and directed inmate G. to go to lock up, i.e., return to her cell.¹¹ Inmate G. refused to return to her cell, and instead knelt down. Appellant returned to her desk approximately 15 feet away. While inmate G. squatted in the

⁹ Close B inmates are confined to their cells.

¹⁰ A CDC-115 is a rules violation report. A CDC-128 is an informative or counseling record, and has less serious consequences for the inmate than a CDC-115.

¹¹ At the time, Hanberg was distributing mail and "ducats," passes that allow inmates to leave the HU.

corner, appellant told Hanberg, "She wants me to call the Watch Sergeant but I ain't calling the Watch Sergeant for no inmate."

Several inmates then came over to inmate G. Mojarros directed inmate G. to return to her cell because she was causing disruption in the unit, but inmate G. refused. The inmates began yelling and swearing at appellant. According to Mojarros, the inmates started to move toward the area of appellant's desk in an aggressive manner. appellant activated her personal alarm. Appellant testified that she did so after inmate G. slammed her hands on appellant's desk, making a loud noise, and started to leap over the desk toward appellant. Neither Mojarros nor Hanberg observed inmate G. slam her hands on appellant's desk. Hanberg testified that appellant activated her alarm ten to 15 seconds after her comment that she would not call a Sergeant.

After hearing the alarm, Hanberg turned around and saw inmate G. in front of appellant's desk, crouched down, approximately 15 feet away from appellant, who was standing behind her desk. Mojarros testified that the next time he saw inmate G., she was within three to four feet of appellant's desk, but he did not see her move.

Mojarros yelled at the inmates to stay down and not to move. Lomeli and COs Pace, Clemens and Tyler responded within 30 seconds to a minute after the alarm was sounded. When these officers arrived, the inmates were screaming, "Riot, Riot"; "Ms. Warren, you're not right"; and "[Inmate G.] didn't do anything wrong." At that time, Inmate G. was 10 to 15 feet away from appellant, kneeling down and in tears.

When he arrived at HU 1, Lomeli did not observe an emergency, and asked who set off the alarm. Appellant said that she did, and pointed to inmate G. Lomeli asked appellant, "what was going on." Appellant responded that she told inmate G. to face the

wall and the inmate came off the wall in an aggressive, assaultive manner. Lomeli directed CO Pace to handcuff inmate G. The inmates began to yell “Riot, Riot,” and started to stand up. Lomeli told the inmates that they would all receive 115s if they did not stay down. The inmates complied.

COs Pace and Clemens escorted inmate G. to the Watch Office. Lomeli and the other COs locked the remaining inmates in their cells without further incident.

After inmate G. was taken to the Watch Office, she was questioned there by acting Watch Commander Sergeant Raymond Sabin (Sabin), Cavalier, and Lomeli upon his return from HU 1. According to Lomeli, inmate G. was typically not a threat to staff,¹² and he had not observed any emergency.

That evening, November 11, 1997, Sabin prepared a memo to the Captain recommending adverse action against appellant for her inappropriate actions. According to Sabin, there was no reason for appellant to remove inmate G. from her cell at the time she did to inform her of the 115. Sabin testified that appellant should have either informed inmate G. that she would issue her a 115 immediately after the rules violation, or notified Inmate G. through the cell door after inmate G. had been locked up. appellant also should have called her supervisor, Lomeli.¹³

¹² Hanberg testified that appellant picked on inmate G. and “always had something to say to her”, and that the inmate would stay in her cell to avoid confrontations with appellant. Clemens testified that on the way to the Watch Office, inmate G. stated that appellant picked on her, and the inmate had to avoid confrontations because she did not want to lose her parole date.

¹³ On September 29, 1997, Lomeli had verbally counseled appellant for activating her personal alarm unnecessarily after inmate G. failed to obey appellant’s orders.

("Wetback" Comment)

Hanberg testified that, at some point¹⁴ after appellant activated her alarm, in response to an inmate who asked why she "did that to that girl," appellant stated, "Why do you care? This is a wetback thing." Hanberg was "shocked" by appellant's remark because she had criticized others at the institution for being racist toward her and other officers.

Hanberg's original report, prepared the night of the alarm incident, did not mention the "wetback" statement. Hanberg subsequently prepared a 115 report and testified at inmate A.'s 115 hearing on November 27, 1997 that appellant had made the comment.¹⁵ Inmate A.'s 115 report was dismissed in December 1997.

Appellant denied making the "wetback" statement at her investigatory interview and at the hearing before the CALJ. She testified that she did not work well with Hanberg because he ignored her and ran his own program, although he was a new officer. Appellant claimed that Hanberg's testimony should be discredited because he did not get along with appellant and he gave conflicting versions about when the "wetback" remark was made.

The CALJ credited Hanberg's testimony over appellant's. The Board adopts the CALJ's credibility determination.

¹⁴ Hanberg could not recall whether the comment was made before the responding officers arrived, after they arrived, or after they locked the inmates in their cells.

¹⁵ On November 11, 1997, appellant prepared a 115 report for inmate A. for inciting other inmates. She also prepared three 115 reports for inmate G. for inciting other inmates, refusing to obey an order to stop communicating with a Close B inmate, and refusing to obey the order to go to her cell; and a 128 report for inmate G. requesting her removal from HU 1.

(Attempt to Change Report)

Approximately one month after the November 11, 1997 alarm incident, at shift change, appellant told Hanberg, "That report is not right and you're going to have to change it." This statement was overheard by CO Arlene Lemos (Lemos), who recalled appellant's comment as, "That report was wrong. You need to rewrite it."

Hanberg assumed that appellant meant the 115 report he had written for inmate A.'s 115 hearing. He did not respond. Hanberg asked Lemos for written confirmation of what she had heard one to two days later. He told Lemos that he thought appellant would try to get him fired.

Appellant denied having any such conversation with Hanberg. She testified that even if the conversation had occurred, she was free to express her opinion that the report was incorrect and convince a fellow officer to change it. Appellant stated that she did not tell Hanberg to falsify the report.

The CALJ, using the standards of credibility set forth in Evidence Code § 780, found that appellant tried to convince Hanberg to change his report. The CALJ especially credited Lemos's testimony, finding that there was no legitimate reason for Lemos to fabricate her testimony to appellant's detriment since there was no pending controversy between them, and Lemos had no stake in the outcome of this appeal. The Board adopts the CALJ's credibility determinations.

(December 23, 1997 Return to Post Incident)

On December 23, 1997, appellant and CO Charles Crawley (Crawley), the floor officer in HU 2, were assigned to monitor the dinner meal in the dining room between HUs 1 and 2. By mutual agreement, appellant was to serve as the steam table officer,

while Crawley would work as the seating officer. As the steam table officer, appellant was supposed to stand by the steam table where hot food was served, assist the Culinary Officer in ensuring that correct portions of food were distributed, and keep track of utensils to avoid contraband and potential weapons. As the seating officer, Crawley was in the table area, observing inmates sitting and eating their dinners.

Toward the end of the dinner period, at approximately 5:45 p.m., the steam table ran out of hot dogs. Appellant sat down across from Crawley. At the time, 75 inmates were seated and 50 were standing along the wall waiting for their food. Appellant could only observe part of the steam table line from her seated position.

Lomeli observed appellant sitting with Crawley, although he had seen her earlier at the steam table. He approached appellant and Crawley, and asked why no one was at the steam table line. There was no response.

There were some discrepancies among the testimony of Crawley, Lomeli and appellant as to the interaction between Lomeli and appellant thereafter. According to Crawley, Lomeli gave appellant a "clear directive" to "please return to the steam line" in a "very professional and respectful" manner. Appellant seemed annoyed, and did not move or otherwise react. Lomeli again told appellant to return to her assigned post. Appellant did not get up until after the second directive. Appellant and Lomeli walked toward the steam table, then stopped and had a conversation that Crawley could not hear. Appellant then returned to the steam table.

Lomeli testified that he had to ask appellant several times why she was not on the steam line before she acknowledged him and told him that they had run out of hot dogs. He responded that was "no excuse," and told her to return to her post.

Appellant did not look at him, but, instead, simply sat still. Lomeli again directed appellant to return to her post. He then looked appellant in the face and said, "Warren, I'm giving you an order. Return to your post." Appellant stood up and said she "would not allow him to counsel her in front of inmates and this was going to stop." Lomeli again told appellant to report to her post. Appellant started to move toward the door and Lomeli said, "No, go back to your post." Appellant then returned to the steam table line. According to Lomeli, he told appellant to return to the steam table five to seven times, and gave her three to four orders to do so.

CO Adeaner Mincey (Mincey), who was outside the dining room where appellant was working but could observe it from her position, testified that appellant was in the process of getting up and moving toward the steam table when Lomeli approached appellant and Crawley. Mincey also saw Lomeli shake his finger at appellant. Mincey admitted, however, that she could not hear the conversation between appellant and Lomeli from her position outside the dining room.

Appellant testified that she was in the process of getting up and moving toward the steam table when Lomeli approached appellant and Crawley and asked who was working the steam line. According to appellant, neither she nor Crawley responded, and Lomeli asked appellant again if she was on the steam table line. As appellant was walking toward the steam table, Lomeli shook his finger in her face and told her, "The next time I address you, you must speak to me." Appellant told Lomeli that he "should not talk to her like that in front of inmates." Appellant asserted that she had not received a direct order from her supervisor with which she failed to comply.

Applying the standards of credibility set forth in Evidence Code § 780, the CALJ concluded that appellant did not comply with her supervisor's direct order to return to her assigned post until he gave her at least two orders to do so. The CALJ especially credited Crawley's observation and testimony, finding that there was no legitimate reason for him to offer fabricated testimony to appellant's detriment since there was no pending controversy between them, and he had no stake in the outcome of any appeal. The Board adopts the CALJ's credibility determinations.

(Hating Inmate Comments)

On Friday, February 27, 1998, appellant was working as the Control Booth Officer on second watch¹⁶ in HU 3. Inmate R. informed CO Oze Morales (Morales) that she was assigned as his porter that day, and asked if he had any instructions for her. Appellant interrupted them, and stated that inmate R. could not talk to her unless she went through Morales. Appellant then said in a very loud voice that she "hated" inmate R. According to Morales, ten to 15 inmates were within hearing range of appellant's comment. Morales observed that inmate R. had tears in her eyes, but kept her composure and did not respond. The other inmates approached Morales to talk about appellant's statement, but Morales would not discuss a fellow officer with the inmates.

Later that day, appellant called Morales and said he was not running the HU as well as another officer. Morales responded that he was not happy with the way appellant put him "in the middle" after "setting fires." Appellant replied that that was just

¹⁶ Second watch hours are 6:30 a.m. to 2:30 p.m.

the way she talked, and “guessed that they won’t get along.” Appellant later apologized to Morales and Morales accepted her apology.

Appellant denied saying that she “hated” inmate R. She stated that she only told Morales that she “disliked” inmate R. According to appellant, her discussion of inmate R. with Morales occurred after he incorrectly reported on the inmate’s timecard that she worked seven hours on a day when there was a lockdown, which prevented the inmates from working. Morales denied discussing any discrepancy about inmate R’s timecard with appellant.

On Saturday, February 28, 1998, appellant was again working as the Control Booth Officer in HU 3, but on first watch.¹⁷ Watch Commander Aaron Bazan (Bazan) and Acting Warden/Administrative Officer of the Day Vittorio Federico (Federico), the Supervisor of Correctional Education, visited appellant during their routine tour of the institution.

Bazan asked appellant, “How’s it going.” Appellant responded angrily and with agitation that, “Things are not working right in this place.” She then told Bazan and Federico three to four times that she “hated” inmate R. because the inmate had wrongly accused her. Appellant also complained about “favoritism” in the institution, and that inmate R. had been shown favoritism by staff although she “snitched” on other inmates. Appellant stated that inmate R. avoided work, was taken at face value, and the supervisors were not doing anything to discipline the inmate. Bazan asked who was favoring the inmate because favoritism was not allowed, and if appellant had mentioned

¹⁷ First watch hours are 10:30 p.m. to 6:30 a.m.

the situation to her supervisors. Appellant would not give names to Bazan because she did not want staff and the inmates to learn that she had reported them. Appellant also told Bazan that reporting the situation to her superiors would do no good because inmate R. would be believed.

Appellant also mentioned an unfavorable contact with the aerobics coach who reported to Federico. According to appellant, the coach “demanded” that she release inmates to go to the gym. Bazan asked appellant if she wanted to file a complaint, but appellant did not. Federico told appellant that he would look into it.

Neither Bazan nor Federico believed appellant was communicating information that she expected they would maintain in confidence. They were very concerned about appellant’s statements and demeanor because she was serving in an armed post. They tried to calm her down, and asked if she needed to be relieved from her post. Appellant said that she was in control. Bazan informed appellant that he would have to document the incident, and then left.

Bazan reported the encounter with appellant to the Captain the following Monday, March 2, 1998. He prepared a memo describing the incident on March 11. Federico co-signed the memo.

Appellant admitted telling Bazan and Federico that she “hated” inmate R., but “not to the extent” that they indicated. Appellant informed the two about inmate R.’s incorrect timecard and avoidance of work as part of a report on what was going on in the HU. Appellant also testified that she had been “disrespected” by the coach who “hollered” at her. Federico said he would take care of the timecard issue and talk to the coach. Appellant felt comfortable “bearing her soul” to the managers. Appellant

asserted that if Bazan and Federico found her remarks to be so serious, they should have filed a written report immediately, not two weeks later.

The CALJ credited Bazan's and Federico's testimony about the incident over appellant's, using the standards of credibility set forth in Evidence Code § 780. The CALJ also credited Morales's account of appellant's statement on February 27, 1998 over appellant's testimony to the contrary. The CALJ concluded that appellant stated that she "hated" inmate R. on February 27, 1998 in the presence of Morales and HU 3 inmates, because she admitted making the identical remark about the same inmate the next day to two high-ranking NCWF officials. The Board adopts the CALJ's credibility determinations.

(Character Witnesses)

Appellant presented Mincey and three other NCWF employees¹⁸ as character witnesses. These individuals testified that appellant was a competent, professional, experienced, and "stern but fair" officer who went "by the book," and inmates did not like that. Sabin also acknowledged that appellant was known as a strict enforcer of the rules.

Appellant contended that because she was not "politically correct" in confronting fellow officers about not following the rules, they turned on her and had a motive to discredit her by providing exaggerated and untruthful testimony in this proceeding. This defense was not supported by any credible evidence, and is therefore rejected.

¹⁸ One, a Correctional Counselor, had not supervised appellant since July 1991. The others were COs.

Procedural History

The Department dismissed appellant effective June 26, 1998, contending that her misconduct violated Government Code § 19572, subdivisions (d) inexcusable neglect of duty, (f) dishonesty, (m) discourteous treatment of the public or other employees, (o) willful disobedience, and (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.

On August 20, 1998, at the beginning of the first day of hearing before the CALJ, the Department presented a second amendment to the NAA.¹⁹ Before proceeding with the evidentiary hearing, the CALJ ordered the Department to offer appellant a Skelly meeting to respond to the amended NAA. On August 28, 1998, that Skelly meeting was conducted. After that meeting, the Skelly officer sustained the charges set forth in the amended NAA.

Citing Barber v. SPB,²⁰ appellant moved for backpay between June 26, 1998, the effective date of dismissal, and August 28, 1998, the date of the Skelly meeting on the amended NAA. In her Proposed Decision, relying upon Masters, the CALJ denied appellant's request for backpay. The CALJ also recommended that the dismissal be modified to an eight-month suspension and a permanent demotion to a non-peace officer position for which appellant met the minimum qualifications. The Board rejected

¹⁹ According to the brief the Department filed with the Board, the Department originally served the NAA upon appellant on April 29, 1998. Appellant's first Skelly meeting was conducted on June 10, 1998. As a result of that meeting, one of the charges in the original NAA was withdrawn. On June 22, 1998, the Department served an amended NAA upon appellant that reflected the withdrawal of that charge. The NAAs served on April 29 and June 22 will collectively be referred to herein as the "original NAA."

²⁰ (1976) 18 Cal.3d 395.

the Proposed Decision to consider particularly the issues of: (1) what was the appropriate penalty for the proven misconduct; and (2) whether appellant was entitled to backpay between June 26 and August 28, 1998. The Board also asked the parties to brief whether the Board should reconsider its precedential decision in Masters.

The Board has reviewed the record, including the transcripts, exhibits, and written arguments of the parties, and has heard the oral arguments of the parties, and now issues the following decision.

ISSUES

1. Has the Department established legal cause for discipline against appellant?
2. What is the appropriate penalty for the proven misconduct?
3. Should the Board's decision in Masters, which found that an appointing power could amend a notice of adverse action to include new charges without changing the action's effective date, be overturned in light of Skelly's requirements that an employee must be given prior notice and an opportunity to respond to the charges in a proposed adverse action before the effective date of discipline?
4. Is appellant entitled to backpay as a result of the amendment of the NAA in this case?

DISCUSSION

Legal Causes for Discipline

(Inexcusable Neglect of Duty)

The Board has defined “inexcusable neglect of duty” under Government Code § 19572(d) to be the intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty.²¹

Appellant’s conduct on November 11, 1997 unnecessarily escalated the confrontation with inmate G. Appellant should have either issued inmate G. a rules violation report immediately after the inmate disobeyed her orders, reported the matter to her supervisor, or later informed the inmate while the inmate was in her cell that appellant intended to file a rules violation report against her. Instead, appellant waited more than one hour after inmate G. had violated the rules, removed the inmate from her cell, and announced in front of other inmates her intention to discipline inmate G. These inappropriate actions caused unnecessary disturbance and commotion among the inmates. In response to this commotion, appellant improperly activated her alarm. This misconduct constitutes inexcusable neglect of duty under Government Code § 19572(d).

Appellant also inexcusably neglected her duty on December 23, 1997 when she left her assigned post at the steam table at a time when inmates were still waiting to

²¹ Ulysses S. Washington (1993) SPB Case No. 93-10; Arnold-Leal (1996) SPB Dec. No. 96-17; Jose L. Flores, Jr. (1994) SPB Dec. No. 94-24; Marc Shelton (1994) SPB Dec. No. 94-19; Robert Herndon (1994) SPB Dec. No. 94-07.

obtain their food. This misconduct constitutes cause for discipline under Government Code § 19572(d)

(Dishonesty)

The Board has defined dishonesty under Government Code § 19572(f) as an intentional misrepresentation of known facts.²² The preponderance of the evidence establishes that appellant gave untruthful responses during her investigatory interview when she denied that she called Bryant a “rat” and a “snitch” and made the “wetback” comment heard by Hanberg. This misconduct constitutes dishonesty under Government Code § 19572(f).

(Discourtesy)

Appellant was discourteous to Bryant on June 10, 1997 when she called him a “snitch” and a “rat,” and used profanity after he had asked her not to. Appellant was also discourteous when she made the “wetback” comment on November 11, 1997, and when she later asked Hanberg to change his report relating to that comment. Appellant was discourteous to Lomeli on December 23, 1997 when she ignored his inquiries and orders about covering the steam table. Finally, appellant was discourteous when she loudly proclaimed in the housing unit on February 27, 1998 that she “hated” inmate R., and repeated that statement to two institutional administrators the next day. These incidents of discourtesy were clearly inappropriate in a prison setting and, therefore, constitute cause for discipline under Government Code § 19572(m).

²² Marc Shelton, supra.

(Willful Disobedience)

In order to establish willful disobedience under Government Code § 19572(o) an employer must show that an employee knowingly and intentionally violated a direct command or prohibition.²³ The Department has shown that appellant intentionally disregarded the direct orders of her supervisor to return to her post at the steam table on December 23, 1997. The Department has, therefore, established legal cause for discipline under Government Code § 19572(o).

(Other Failure of Good Behavior)

In order justify discipline under Government Code § 19572(t), the Department must show a failure of good behavior on the part of appellant which is of such a nature as to cause discredit to the Department or appellant's employment.²⁴ For discipline to be sustained under Government Code § 19572(t), it

must be based on more than a failure of good behavior; it must be of such a nature as to reflect upon [an employee's] job... the misconduct must bear some rational relationship to [an employee's] employment and must be of such a character that it can easily result in the impairment or disruption of the public service. . . The legislative purpose behind subdivision (t) was to discipline conduct which can be detrimental to state service. . . . It is apparent the Legislature was concerned with punishing behavior which had potentially destructive consequences, rather than concentrating upon intentional conduct.²⁵

The critical questions that must be addressed to sustain discipline under Government Code § 19572(t) are: (1) whether there is a rational relationship between appellant's failure of good behavior and her duties as a Correctional Officer; and (2)

²³ Jeffrey Crovitz (1996) SPB Dec. No. 96-19.

²⁴ Warren v. State Personnel Board (1979) 94 Cal.App.3d 95, 104.

²⁵ Stanton v. State Personnel Board (1980) 105 Cal.App.3d 729, 739-40. (Emphasis in original.)

whether her failure of good behavior may result in the impairment or disruption of public service in the Department.²⁶

Appellant, as a peace officer, is held to a very high standard of behavior.²⁷ As set forth in the Board's class specification²⁸ for her position, a Correctional Officer must be able, among other things, to do the following:

... interpret and enforce institutional rules and regulations with firmness, tact, and impartiality; ... correctly follow oral/written directions; accept the requirements of the Department and institution; ... make appropriate use of disciplinary options; deal tactfully and professionally with the public, inmates, and staff; willingness to follow chain of command; ...analyze situations accurately and adopt an effective course of action...

In addition, a Correctional Officer must possess the following special personal characteristics:

Emotional maturity and stability; sympathetic and objective understanding of persons in custody; ... tact; good personal and social adjustment for correctional work...

Appellant's discourteous comments to Bryant, her inappropriate reaction to inmate G.'s misbehavior, her use of the term "wetback" in response to an inmate's inquiry, her request that Hanberg change his report, her failure to remain at her post at the steam table, her failure to respond immediately to her supervisor's direct orders to return to the steam table, her expressing "hate" for an inmate, and her dishonesty during her investigatory interview evince a failure of good behavior and indicate that appellant does not possess these abilities and characteristics. There is uncontroverted

²⁶ See, Id. at p. 739.

²⁷ See, Jesus H. Reyes (1993) SPB Dec. No. 93-04.

evidence in the record to establish that a rational relationship exists between appellant's misconduct and her official duties as a Correctional Officer for the Department.

There is also sufficient evidence in the record to establish that appellant's failure of good behavior may result in the impairment or disruption of public service in the Department. In the quasi-military environment of a prison, correctional officers must depend upon each other for the effective and safe functioning of the institution. Close working relationships between correctional officers based upon loyalty, trust and confidence are essential to fulfilling the institution's public responsibilities. A correctional officer working in a prison setting must work cooperatively with fellow officers and act in a manner that ensures that no fellow officer's authority is undermined. In addition, subordinate officers' obedience to the legal orders of their superiors is vital to ensure that proper discipline and control is maintained at all times. Appellant's discourteous treatment of her supervisor, fellow officers and inmates, particularly when it occurred in the presence of other inmates, clearly disrupted the close working relationships necessary to preserve control and harmony at NCWF. Appellant's willful disobedience of her supervisor's direct commands threw into question her loyalty and willingness to respond immediately to any future commands. That discourtesy and disobedience, together with her inexcusable neglect of her duties and her dishonesty during her investigatory interview, impaired the ability of her superiors to maintain discipline, had a corrosive effect upon her working relationships with her fellow officers,

²⁸ The Board takes administrative notice of its class specification for Correctional Officer.

impeded the performance of her job, and substantially disrupted the efficient operation of the Department.

The Department has, therefore, established that appellant's misconduct constitutes legal cause for discipline under Government Code § 19572(t).

Penalty

When performing its constitutional responsibility to review disciplinary actions,²⁹ the Board is charged with rendering a decision that is "just and proper."³⁰ To render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the California Supreme Court in Skelly v. State Personnel Board (Skelly)³¹ as follows:

...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. [Citations omitted.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence.

As set forth above, appellant's conduct resulted in, and if repeated, is likely to result in harm to the public service. Appellant's discourtesy, inexcusable neglect of duty, dishonesty, willful disobedience of her supervisor's legal orders, and other failure of good behavior clearly resulted in the disruption of public service in the Department. The Board finds that there are no mitigating circumstances to justify appellant's misconduct.

²⁹ Cal. Const. Art. VII, section 3(a).

³⁰ Government Code § 19582

Moreover, the Board finds that the likelihood of recurrence in this case is very high. Appellant has already been formally disciplined twice for behavior similar to the misconduct exhibited in this case. During the hearing before the CALJ, appellant denied any wrongdoing, claiming that fellow employees were out to get her because she was a “stickler” in following the rules. Given appellant’s failure to learn from her two prior disciplinary actions and her refusal to accept any responsibility for her wrongdoing in this case, the Board finds that a reduction in the penalty is not warranted.

The Board, therefore, determines that dismissal is the just and proper penalty in this matter.

Skelly Issues

On the first day of hearing before the CALJ, the Department sought to amend the NAA. The CALJ allowed the amendment, but ordered the Department to offer appellant another Skelly meeting to respond to the amendment, and continued the evidentiary hearing until after that Skelly meeting was conducted. That Skelly meeting was held on August 28, 1998.

Appellant contends that she is entitled to backpay from June 26, 1998, the effective date of her dismissal, until August 28, 1998, the date of the Skelly meeting on the amended NAA, claiming that she was, in effect, disciplined between June 26 and August 28, 1998 without the prior notice and opportunity to respond that Skelly requires.

³¹ (1975) 15 Cal.3d 194, 217-18.

Reconciling Government Code § 19575.5 with Skelly

In Skelly, the California Supreme Court ruled that a state civil service employee who has attained permanent status has a constitutionally protected property interest in that status. Before a state employer may deprive a permanent civil service employee of that property interest by punitive action, it must comply with certain procedural due process requirements.³² These procedural due process requirements mandate that a civil service

employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.³³ (Emphasis added.)³⁴

Thus, in Skelly, the court made clear that employees with permanent civil service status could not be deprived of their property interest in their jobs until they were notified of the charges against them and given a reasonable opportunity to respond. As the

³² 15 Cal. 3d at p. 207-8.

³³ Id. at p. 215.

³⁴ Pursuant to Skelly, the Board enacted Rule 52.3, which provides, in pertinent part:

(a) Prior to any adverse action . . . the appointing power . . . shall give the employee written notice of the proposed action. This notice shall be given to the employee at least five working days prior to the effective date of the proposed action. . . . The notice shall include:

- (1) the reasons for such action,
- (2) a copy of the charges for adverse action,
- (3) a copy of all materials upon which the action is based,
- (4) notice of the employee's right to be represented in proceedings under this section, and
- (5) notice of the employee's right to respond.... (Emphasis added.)

Board stated in Leah Korman,³⁵ “an employee’s right to be notified of the charges against him or her is a critical element of due process of law.”

Government Code § 19575.5 permits an appointing power, with the prior approval of the Board, to amend a notice of adverse action after it has been served upon an employee as follows:

At any time before an employee's appeal is submitted to the board or its authorized representative for decision, the appointing power may with the consent of the board or its authorized representative serve on the employee and file with the board an amended or supplemental notice of adverse action. If the amended or supplemental notice presents new causes or allegations the employee shall be afforded a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further answer unless the board or its authorized representative so orders. Any new causes or allegations shall be deemed controverted and any objections to the amended or supplemental causes or allegations may be made orally at the hearing or investigation and shall be noted in the record.

In Masters, the Board attempted to reconcile the due process requirements announced in Skelly with the authority Government Code § 19575.5 grants to an employer to amend a notice of adverse action, after it had become effective, to include new causes and allegations against an employee. In Masters, the Board determined that, although the employer was required to provide the employee with a new Skelly meeting to respond to the amendment, the amendment did not constitute a Skelly violation that would mandate that the effective date of the action be changed to the date of the new Skelly meeting. Instead, the Board determined that, in accordance with Government Code § 19575.5, the employer could amend the adverse action notice to

³⁵ (1991) SPB Dec. No. 91-04.

include additional charges without having to extend the effective date of the adverse action until after the second Skelly meeting.

Attempts to apply the rationale set forth in Masters to different factual scenarios have yielded inconsistent results. We, therefore, revisit the Skelly issues addressed by the Board in that decision.

Skelly requires that a disciplined employee must receive “a copy of the charges and materials upon which the action is based” before discipline can become effective. The Board has issued numerous decisions that have concluded that this provision with respect to the materials upon which the action is based refers to all the materials reviewed by the ultimate decision maker when making the decision to take adverse action.³⁶ In both Hernando Morales³⁷ and Karen A. Johnson,³⁸ the Board found that the employer violated the disciplined employee’s Skelly rights when it gave the employee only some, but not all, of the materials upon which the action was based before the effective date of the action.³⁹

The rules that define the scope of an employee’s entitlement to “materials upon which the action is based” should also define the scope of the employee’s entitlement to notice of the charges upon which the action is based – in order to comply with Skelly’s due process procedural requirements, an employer must give the disciplined employee

³⁶ See, e.g., Charles T. Cook (1999) SPB Dec. No. 99-03.

³⁷ (1998) SPB Dec. No. 98-07.

³⁸ (1992) SPB Dec. No. 92-02.

³⁹ Similarly, the court in Parker v. City of Fountain Valley (1981) 127 Cal.App.3d 99, 107-8, found that a disciplined peace officer’s due process rights were violated when the chief of police, when deciding to take adverse action, relied upon new material not given to the disciplined police officer at the pre-termination meeting, which was conducted before the final decision was made.

notice of, and the opportunity to respond to, all the charges upon which the action is based before discipline can become effective.⁴⁰ To allow an employer to give notice to an employee before the action's effective date of only some of the charges upon which the action is based would contravene Skelly's preremoval safeguard requirements and violate the employee's constitutional due process rights. Government Code § 19575.5 must be interpreted and applied in a manner that is consistent with the due process requirements announced in Skelly.

The Board, therefore, overturns that portion of its decision in Masters that would permit an employer to amend a notice of adverse action to include new charges without changing the effective date of the action.

Applying Government Code § 19575.5 and Skelly Consistently

When an employer requests permission from a Board administrative law judge to amend a notice of adverse action pursuant to Government Code § 19575.5,⁴¹ and the employee objects, the administrative law judge will apply the following analysis to ensure that Skelly's due process requirements are met:⁴²

⁴⁰ The Board recognizes that its Rule 52.3 (see, footnote 34 supra) provides that an employer must give a disciplined employee a copy of "all materials upon which the action is based" and a copy of "the charges for adverse action." By not including the word "all" when referring to the charges, the Board did not intend to imply that, prior to the effective date of discipline, a copy of all the materials had to be provided, but a copy of only some, but not all, of the charges could to be provided to the employee.

⁴¹ An employer may withdraw a notice of adverse action and serve a new notice without obtaining prior Board approval. If an employer takes such unilateral action, it must reimburse the disciplined employee for any backpay and benefits lost between the original effective date of the withdrawn adverse action and the new effective date of the new adverse action.

⁴² Although Government Code § 19575.5 authorizes a Board administrative law judge to approve an amendment to a notice of adverse action up until the time a matter is submitted for decision, the better practice is for an employer to request in writing that the administrative law judge approve the amendment as soon as the employer realizes that an amendment is necessary, preferably well before the evidentiary hearing begins. With the proposed amendment, the employer must also serve copies of all the materials upon which the amendment is based. Before the administrative law judge rules on the

The administrative law judge will decide whether the proposed amendment includes new “charges” not included in the original notice. The Board interprets the term “charge” as used in Skelly to mean an alleged incident of wrongdoing against the employee upon which the disciplinary action is based. If the administrative law judge concludes that the proposed amendment includes new charges, consistent with both Government Code § 19575.5 and Skelly, the administrative law judge may allow the amendment, but in such case will order that the effective date be modified, and that the employee be granted an opportunity at least five days prior to the new effective date to respond to the new charges at a Skelly meeting.⁴³ In the case of a dismissal or demotion, the disciplined employee will be entitled to lost backpay and benefits from the original effective date to the new effective date. The administrative law judge will not permit the employer to present any evidence relating to the new charges until after the employee has received both the opportunity to respond to those new charges at a Skelly meeting and a reasonable opportunity to prepare a defense.

If the employer wishes to add either: (1) new legal causes for discipline under Government Code § 19572 that were not included in the original notice of adverse action; (2) new factual details that pertain to the charges that were included in the original notice of adverse action but do not, in themselves, constitute new charges; or (3) technical changes,⁴⁴ the employee will not be entitled to a new Skelly meeting and

employer's request, the employee should be granted a reasonable opportunity to respond to the request.

⁴³ See, Board Rule 52.3.

⁴⁴ See, Caveness v. State Personnel Board (1980) 113 Cal. App. 3d 617, 627-628.

the effective date of the adverse action will not be changed, because these types of amendments, standing alone, do not constitute new charges.⁴⁵ The administrative law judge may allow the amendment, but, in accordance with Government Code § 19575.5, may decide that these changes are sufficiently significant to warrant granting the employee additional time to prepare a defense. If the administrative judge makes this determination, he or she will not take any evidence relating to the amendments until the employee has had a reasonable opportunity to prepare a defense thereto. If the administrative law judge decides that the amendments are not sufficiently significant to warrant granting the employee additional time to prepare a defense thereto, the evidentiary hearing may proceed as scheduled.

Effect of the Amendment in this Case

Appellant was dismissed effective June 26, 1998 pursuant to the original NAA. While it was not as factually detailed as the amended NAA, the original NAA contained the basic substance of all the charges against appellant and all the legal causes for discipline. Appellant's first Skelly meeting was held on June 10, 1998, prior to the effective date of her dismissal. Because the original NAA contained the basic substance of all the charges against her, in accordance with Skelly, appellant received adequate notice of, and opportunity to respond to, those charges at her first Skelly meeting.

⁴⁵ If an employer seeks to add both new legal causes for discipline and new factual details to existing charges, the administrative law judge may find that, when considered together, the proposed amendments constitute new charges that warrant a new opportunity for a Skelly meeting and a new effective date. Thus, administrative law judges will not only review each proposed amendment individually, they will also assess the proposed amendments as a whole to determine whether there should be a new Skelly meeting and a new effective date.

The amended NAA did not include any new charges or legal causes for discipline; it merely added more factual details to the charges already included in the original NAA.⁴⁶ Because the amendment to the NAA did not add any new charges, it did not raise due process concerns, nor did it warrant another Skelly meeting, a new effective date or an award of backpay.

Although the Department did not add any new charges or legal causes for discipline in the amended NAA, it did add significant new factual details. Those new factual details were sufficiently substantive to warrant granting appellant additional time to prepare a defense under Government Code § 19575.5. The CALJ ordered that appellant be offered a new Skelly meeting, and continued the evidentiary hearing until after that new Skelly meeting was conducted. Although appellant was not entitled to a

⁴⁶ For examples, Charge C originally stated:

Approximately three weeks after the events of November 11, 1997, you attempted to have Officer Hanberg change his report of November 11, 1997, in which he documented your reference to Hispanic inmates as “wetbacks.”

In the amended NAA, Charge C was modified to provide:

Approximately three weeks after the events of November 11, 1997, you approached Correctional Officer L. Hanberg in the hallway of central control. You attempted to have Officer Hanberg change his statement regarding the events of November 11, 1997, in which he documented your reference to Hispanic inmates as “wetbacks.” Your conversation with Officer Hanberg was overheard by Officer Lemos.

Charge D originally provided:

On or about December 23, 1997, you displayed willful disobedience to Sergeant Lomeli by refusing his order for you to assume your post on the steam line in dining hall #1.

In the amended NAA, Charge D was modified to provide:

On or about December 23, 1997, you displayed willful disobedience to Sergeant G. Lomeli by refusing his order for you to assume your post on the steam line in dining hall #1. Sergeant Lomeli observed you talking with Officer C. Crawley at a dinner table. When Sergeant Lomeli asked you why you were not at the steam line where you were assigned you ignored him and would not answer his questions. When you were ordered to go back to your position in the steam line you started to walk away, stating “No. I am not going to allow you to continue to counsel me in front of inmates.” Only after you were repeatedly ordered to your post did you comply with Sergeant Lomeli’s order.

new Skelly meeting, the continuance granted by the CALJ afforded appellant sufficient additional time to prepare a defense in accordance with Government Code § 19575.5. Thus, appellant received all rights to which she was entitled under both Skelly and Government Code § 19575.5.

CONCLUSION

The Department proved by a preponderance of the evidence that dismissal is the just and proper penalty in this matter. Appellant has failed to show that she is entitled to an award of backpay.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The dismissal of Ethel Warren from her position as Correctional Officer at the Northern California Women's Facility with the Department of Corrections at Stockton effective June 26, 1998 is sustained.

2. This decision is certified for publication as a Precedential Decision.
(Government Code § 19582.5).

STATE PERSONNEL BOARD⁴⁷

Florence Bos, President
Ron Alvarado, Vice President
Richard Carpenter, Member
William Elkins, Member

* * * * *

⁴⁷ Board Member Sean Harrigan did not participate in this Decision.

I hereby certify that the State Personnel Board made and adopted the foregoing
Decision and Order at its meeting on October 5–6, 1999.

Walter Vaughn
Executive Officer
State Personnel Board

[Warren-dec]